APPENDIX A

THE TAX COURT OF THE UNITED STATES

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Docket No. 37694 Filed March 14, 1955.

Opinion

MURDOCK, *Judge:* The Commissioner determined deficiencies as follows:

Year	*Income tax*	*Excess profits tax*
1941	$32,196.29	....
1942	....	$1,426.59
1943	....	2,416,728.13
1944	91,026.81	1,032,315.21

All facts stipulated by the parties are adopted as findings of fact.

* * * * * * * * * *

[Portion of opinion dealing with other issues omitted]

War Facility Amortization

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period, up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit

the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the certificates of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124(a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made." Section 124(f)(1) provides that in determining the adjusted basis of an emergency facility "there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31, 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after December 31, 1939, and that the provision may not be read "the cost attribut-

able to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied 339 U.S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp.* v. *United States*, 108 F. Supp. 616.

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing in the language of the Act, or in its legislative history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124(f)(1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning of Judge Miller in his

dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, J., dissents on the last issue on the authority of *United States Graphite Co.* v. *Sawyer*, (C.A., D.C. Cir.) 176 F. 2d 868, certiorari denied 339 U.S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co.* v. *United States*, (Ct. Cl., Mar. 1, 1955) 129 F. Supp. 215.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 253—October Term, 1955.

(Argued January 13, 1956 Decided February 14, 1956).

Docket No. 23902

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

NATIONAL LEAD COMPANY, *Respondent*.

Before: CLARK, *Chief Judge*, FRANK and LUMBARD, *Circuit Judges*.

The Commissioner of Internal Revenue petitions for review of a decision of the Tax Court, J. E. Murdock, *Judge*, 23 T. C. 988, holding that the War Production Board had no authority to issue partial certificates of necessity under

§ 124 of the Internal Revenue Code of 1939 and that the taxpayer is entitled to amortization of the entire cost of facilities covered by such certificates. Reversed.

* * * *

LUMBARD, *Circuit Judge:*

This is a petition by the Commissioner for review of a decision by the Tax Court that the taxpayer was entitled to accelerated amortization under § 124 of the Internal Revenue Code of 1939 (as amended) of the entire cost of certain "emergency facilities" constructed during World War II. Section 124(e)(1) provided:

> "As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made."

Section 124(f)(1) provided for the inclusion in the basis of such an emergency facility of:

> "so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

Section 124(f)(3) further provided that:

> "In no event and notwithstanding any of the other provisions of this section, no amortization deduction

shall be allowed in respect of any emergency facility for any taxable year—(C) unless a certificate in respect thereof under paragraph (1) shall have been made (i) prior to the filing of the taxpayer's return for such taxable year, or prior to the making of an election * * * to take the amortization deduction, or (ii) before December 1, 1941, whichever is later * * * "

On December 17, 1943 the President transferred the certifying function to the War Production Board. Executive Order 9406, 8 Fed. Reg. 16955. In 1944 the Board issued to the taxpayer certificates that the facilities now in question "are necessary to the national defense during the emergency period, up to 50% [or in some cases 35%] of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof * * * " It appears that these partial certificates were issued pursuant to a policy of the WPB, adopted toward the end of the war, of certifying only that part of the cost of a facility attributable to excess war costs.

In filing its return for 1944 the taxpayer claimed accelerated amortization only for the percentage of the cost which had been certified, taking ordinary depreciation on the rest. When the Commissioner subsequently asserted a deficiency against the taxpayer for the year 1944 based on other grounds, the taxpayer filed a petition with the Tax Court on November 21, 1951, seeking to have that court review the deficiency. On April 9, 1954 the taxpayer filed an amended petition, claiming for the first time that the WPB had no authority under the statute to certify only excess war costs and that it is entitled to amortization of the entire cost of the facilities. The Tax Court accepted this argument.

The question whether the WPB had authority to issue these partial certificates presents an interesting problem of statutory interpretation on which courts have differed.

Compare *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, aff'd *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, cert. denied, 339 U. S. 904, with *Wickes Corp.* v. *United States*, 108 F. Supp. 616 (Ct. Cl. 1952) and *Ohio Power Co.* v. *United States*, 129 F. Supp. 215 (Ct. Cl. 1955), cert. denied 350 U. S. 862. We do not reach this question, however, since we conclude that the taxpayer no longer has any right to raise the issue.

The statutory provisions set out above map out a scheme in which the function of determining whether facilities are necessary to the national defense is entrusted solely to the WPB. The determination whether facilities are necessary is within that agency's discretion and is conclusive so long as the discretion is exercised on the basis of criteria not clearly irrelevant to the statutory purpose. An exercise of the agency's discretion is preliminary to any right to claim accelerated amortization under the Code. The agency's decision ordinarily must take place and be evidenced by a certificate made prior to the time when a tax return for the year in question is filed.

It seems clear that if the WPB had denied a certificate altogether on the ground that the facilities were not necessary to the national defense, there would be no review of that action in any forum. Even if the WPB had refused to exercise its discretion or had based its decision on grounds impermissible under the statute, the failure to issue a certificate could not be challenged in the Tax Court. That Court could not exercise the discretion committed to the WPB under the statute and would therefore be incapable of correcting that agency's error.

But the taxpayer urges that we do not have that problem here because it was implicit even in the issuance of the partial certificates that the WPB had determined the facilities to be necessary to the national defense. We do not agree. The certificates stated only that the facilities were "necessary to the national defense up to 50% [or 35%]

of the cost." This statement did not explicitly say that the facilities were necessary in their entirety. Nor is it implicit in the certificate given that the WPB would have determined the facilities to be necessary if the consequence of that determination had been to allow accelerated amortization of the entire cost. The taxpayer's argument on this point follows that of the Court of Claims in *Wickes Corp.* v. *United States, supra.* The Court there said:

> "The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would, perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not 'necessary in the interest of national defense during the emergency period,' would have said to itself, 'If we make a true statement it will cost the Government X dollars in lost revenue. If it would cost the Government only Y dollars, we would tell the truth. But since it will cost X dollars, we will not tell the truth.'"

The difficulty with this argument is that it assumes the determination of a facility's necessity to the national defense to be a black-or-white proposition ascertainable without reference to the cost to the Government. The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of the facility in the scheme of national defense and the cost of the facility to the Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued repre-

sented only a determination that the facility was necessary on the assumption that 35% or 50% rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.

Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. Cf. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20-21 (1952). The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose; *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, D. C. D. C. (1944), aff'd *per curiam sub nom.*, *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (D. C. Cir. 1949), cert. denied, 339 U. S. 904, and the remedy was altogether appropriate. If the petitioner had sought mandamus or appropriate injunctive relief in the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. Cf. *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507, 512-13 (1953). The language of the Supreme Court in the *Callanan* case is quite pertinent here:

"The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer. The appellant accepted the transfer with the limitations contained in the certificate. The appellant now will not be heard to say it is entitled to receive more than its transferor had or the certificate transferred gave." 345 U. S. at 513.

The taxpayer here may well have been denied a certificate altogether if it had challenged the Board's action. Having accepted the certificate it is now bound by its limitations.

The decision of the Tax Court is reversed.

APPENDIX C

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(t) [as added by Sec. 301, Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Amortization Deduction.*—The deduction for amortization provided in section 124.

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 124 [as added by Sec. 302, Second Revenue Act of 1940, *supra*]. AMORTIZATION DEDUCTION.

(a) [as amended by Sec. 155(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis

(for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23(l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(e) [as amended by Sec. 155(d) of the Revenue Act of 1942, *supra*] *Definitions.*—

(1) *Emergency Facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

* * * * *

(f) [as amended by Sec. 155 (e), Revenue Act of 1942, *supra*] *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(26 U.S.C. 1952 ed., Sec. 124.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.124-6 [as amended by T. D. 5432, 1945 Cum. Bull. 180]. *Adjusted basis of emergency facility.*—

(a) *In general.*—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility, in that it shall be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction,

erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation of the remaining portion of the cost ($200,000), see section 29.124-7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the

same facts as in the example in the preceding paragraph, except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of $300,000, or $150,000.

* * * * *

Appendix D

IN THE UNITED STATES COURT OF CLAIMS

No. 290-55

(Decided April 3, 1956)

ALLEN-BRADLEY COMPANY

v.

THE UNITED STATES

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

This case involves the same question twice previously decided by this court: The *Wickes Corporation* v. *United States*, 123 C. Cls. 741; *The Ohio Power Co.* v. *United States*, 131 C. Cls. 95, certiorari denied, 350 U. S. 862. In accord is *National Lead Co.* v. *Commissioner*, 23 T. C. 988, 1002. The United States Court of Appeals for the Second Circuit reversed the Tax Court, *Commissioner* v. *National Lead Co.*, 1956 CCH, par. 9290.

We have reconsidered our earlier decisions in the light of the contrary decision cited above and, with deference, adhere to the view expressed in them.

The plaintiff's motion for summary judgment is granted, and judgment will be entered for the plaintiff. The amount of recovery will be determined pursuant to Rule 38 (c).

It is so ordered.

LARAMORE, *Judge*; WHITAKER, *Judge*, and LITTLETON, *Judge*, concur.

JONES, *Chief Judge*, dissenting:

I dissent for reasons stated in dissents in the *Wickes* and *Ohio Power Company* cases cited in the majority opinion.

Appendix E

[Caption omitted]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 12th day of March, one thousand nine hundred and fifty six.

Present:

HONORABLE CHARLES E. CLARK, *Chief Judge,*
HONORABLE JEROME N. FRANK,
HONORABLE J. EDWARD LUMBARD, *Circuit Judges.*

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

v.

NATIONAL LEAD COMPANY, *Respondent.*

A petition for a rehearing having been filed herein by counsel for the Respondent,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

[Caption omitted]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of February one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK, *Chief Judge,*
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD, *Circuit Judges.*

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

NATIONAL LEAD COMPANY, *Respondent*.

APPEAL FROM THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from the Tax Court of the United States , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed in accordance with the opinion of this Court.

/s/ A. DANIEL FUSARO
Clerk